IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Motion of California Manufacturers Association for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

MISCELLANEOUS

STATUTE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The California Manufacturers Association respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.* The consent of the attorneys for the petitioner herein has been obtained but the attorneys for the respondents herein refused to consent to the filing of a brief by the California Manufacturers Association as *amicus curiae.*

The applicant, the California Manufacturers Association, has an interest in this case in that of its approximately 1100 member companies who employ approximately 65% of the California manufacturing labor force many are parties to collective bargaining agreements that are very similar to the Agreement that exists between the parties in this action.

The decision of the Court of Appeals for the Second Circuit is of particular and vital importance to members of the California Manufacturers Association in that it adversely affects the stability of labor-management relations and re-interprets, contrary to the intention of the parties, similar contractual language existing in the collective bargaining agreements of many of its members. The decision of the court below creates a substantive law which is national in its scope and will, therefore, have a detrimental effect upon the sound and efficient operations of the members of this Association and it is clearly at odds with the reasonable expectations of parties to collective bargaining agreements. Moreover, the action of the Circuit Court is in conflict with and in derogation of the rights afforded employees by the National Labor-Management Relations Act.

The California Manufacturers Association does not know at this time what arguments and authorities the petitioner will present on the merits of the case as contended for by it, but, based upon the briefs of the parties in the court below, the Association believes that the arguments to be presented by the Association will not be merely a duplication of but will be supplemental and in addition to arguments presented by the petitioner and will further reflect upon the collective bargaining process experienced by the Association's members.

Dated at Los Angeles, California this 21st day of July, 1961.

HILL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
Counsel for Amicus Curiae.

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BRIEF OF CALIFORNIA MANUFACTURERS ASSOCIATION AS AMICUS CURIAE.

Statement.

This brief is filed on behalf of California Manufacturers Association (hereinafter sometimes called the "Association"), legally organized pursuant to the laws of the State of California and representing approximately 1100 member companies, employing 65% of the California manufacturing labor force.

Reasons for Allowance of the Writ.

The petition for writ of certiorari should be granted because:

1. The Court of Appeals by its decision in this case, has extended the scope and effect of seniority rights beyond that intended by the parties.

2. The decision of the Court of Appeals is not only irreconcilable with opinions from other United States Courts of Appeal but is in conflict with the collective bargaining process and labor-management practice.

3. The decision of the Court of Appeals creates a federal substantive law, of widespread importance, which would upset labor-management stability and unduly burden employers throughout the country.

4. The decision of the Court of Appeals in this case is in conflict with and in derogation of the national labor policy as expressed in the National Labor-Management Relations Act.

ARGUMENT IN SUPPORT OF REASONS.

I.

Seniority Rights Are Limited by the Collective Bargaining Agreement and These Rights Can Be Added to and Extended Only by the Parties.

The court below reasoned that seniority rights are to be treated *in pari materia* with pension or retired pay rights and that all these types of rights are "vested." *Zdanok v. Glidden Company,* 288 F. 2d 99, 103. That holding flies in the face not only of sound contract law but of the collective bargaining process as well. To begin with, seniority rights, to the extent of their proper scope (and only to that extent) are, like pension rights, admittedly "earned." But the analogy ends at that point. By its very nature, a pension guarantee is an additional monetary consideration for *past* services. Seniority credits, on the other hand, are accorded to the extent agreed and expressed in the employment contract based upon the tacit assumption that the employment relationship will continue in the *future;* and such a relationship presumes actual service within the scope of and contingent upon an existing and continuing contractual arrangement. Seniority rights are neither a guarantee that the employment relationship will continue nor a substitution in the event the relationship ceases.

By deeming seniority rights "vested," the Circuit Court of Appeals has created rights and obligations going far beyond those that the parties to the agreement favored or imposed upon themselves. Even assuming, *arguendo,* that the termination of the Collective Bargaining Agreement did not automatically extin-

guish the specified seniority rights of the Agreement, to what extent are those rights preserved and to what extent are they presently effective and operative? Whatever rights the plaintiffs had emanate from and are limited by the Agreement. Addressing itself to the nature and scope of seniority rights, the Court of Appeals for the Sixth Circuit, in *Elder v. New York Cent. R. Co.,* 152 F. 2d 361, 364 (1945), stated:

> "The right, however, is not inherent. It must stem either from a statute or a lawful administrative regulation made pursuant thereto, or from a contract between employer and employee, or from a collective bargaining agreement between employees and their employer. In the absence of statute, mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment. In the instant case, the appellant rests upon no right created by statute, but solely upon a collective bargaining agreement, made between the chosen representative of the workers and the employer * * * *His individual seniority rights were both created and limited by the bargain which was made for and was binding upon all employees for whom it was made."* (Emphasis added.)

That such rights are limited by a reasonable construction of the agreement from which they are derived has been repeatedly expressed by federal courts and by ar-

bitration boards that have recently been confronted with the same or similar questions. See

Metal Polishers Local 44 v. Viking Employment Co., 278 F. 2d 142 (Third Cir. 1960);

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593 (1960).

See also:

Jones & Laughlin Steel Corp., 20 L. A. 797, 799 (1953).

There is nothing in the Agreement that permits these former employees "to follow their work." The Agreement, reasonably construed, covered the Elmhurst operations and its efficacy was contingent upon continual operations in that area. The court below indicated that such a restricted construction of the collective bargaining agreement would be illogical since it would necessitate that seniority rights could be curtailed if the plant were moved but a city block away. 288 F. 2d at 103-104. The answer to that assertion is obvious. Any such *de minimis* change in contract conditions would almost certainly be treated by courts and others in light of equitable principles. Since in such circumstances there would seldom be a material change in the position or the relationship of the parties, all such rights and obligations would remain intact and in effect. But the movement of a plant and its facilities a distance of over 100 miles, as in this case, is indeed a substantial change going to the very foundation of the collective bargaining agreement and the process that brought it about.

Such a movement not only affects the source, supply and type of personnel available to the employer but

is intrinsically bound up with the reasonable expectations of the employees as well. Almost by necessity, the employer's method of operation, its production schedules, its proximity to markets and materials, its cost factors and analyses, are drastically changed by the type of movement involved in this case. These considerations are the basic ingredients of collective bargaining negotiations and the bargaining process. It would do violence to labor-management relations to expand the area of understanding and impose obligations that at least one party, with good cause and sufficient justification, would hardly have consented to or failed to consider.

Had the parties to this Agreement been willing to expand the scope and effect of seniority rights, despite the possible adverse results to the Employer, familiar contract language was readily available and could easily have been inserted. As the District Court noted at some length in its opinion, such provisions "are not uncommon," and United States Department of Labor Bulletins have for a number of years explained the various types of provisions and techniques that are utilized in labor contracts in regard to seniority rights. A specific but significantly different provision is utilized when seniority rights are intended to be transferred in the event of a geographic relocation of the employer's operations. *Zdanok v. Glidden Company,* 185 Fed. Supp. 441, 447-49. A failure to insert that or a similar provision underscores the fact that the parties never intended to adopt or approve one of the broadest possible seniority guarantees available.

The plaintiffs have stated and the court below seemed to suggest that the failure to adopt explicit and ap-

plicable provision for the transference of seniority rights is because "plant relocation is not a common occurrence." (See Pltf. Br. to the Court of Appeals, pp. 17-18.) Such an argument has no support in fact. Particularly since World War II, literally thousands of firms have relocated their operations. No reponsible union official and hardly any employee or employer can reasonably remain oblivious to the great efflux and influx of manufacturing operations not only from the north to the south but within and throughout the nation and even beyond our borders. Indeed, this prevalent practice is one of the most significant factors in the national economy. It is further exemplified by the increasing number of union agreements that contain severance pay provisions,[1] many of which refer to termination resulting from relocation or are *clearly* broad enough so as to include that situation.[2] On occasion the question as to whether a geographic relocation warrants severance pay is a bitterly contested issue in contract negotiations between the parties.[3] Patently, in labor relations throughout the country vir-

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[1]In 1959 over 150,000 union workers in manufacturing industries in California alone were covered by severance pay provisions. "California Industrial Relations Reports," California Department of Industrial Relations, Division of Labor Statistics & Research, April, 1960, No. 20, pp. 5, 28.

[2]*Id.* at pp. 8-27; See *e.g., Princeton Worsted Mills,* 25 L. A. 587 (1955); *Deep Rock Oil Corp.,* 20 L. A. 865 (1953); *Kaiser-Frazer Corp.,* 12 L. A. 841 (1949).

[3]In a recent arbitration, Rotogravure Employers of Los Angeles and Los Angeles Newspaper Web Pressmen's Union No. 18, I.P.P. and A.U. of N.A. (opinion to be published), one of the principal issues in dispute in the determination of a new contract was whether a severance pay provision should be included, and more particularly, whether such a provision should provide for severance pay in case of a relocation of a plant beyond the jurisdiction of the Union.

tually everyone is cognizant of the relocation problem. The relocation contingency is clearly and reasonably a foreseeable one.

The seniority provisions of the instant Agreement do not include relocation seniority guarantees, "and it is unlikely that it did not occur to the negotiators at the time the agreement was executed that the Company might" relocate in another area, and as an arbitration board stated in an analogous situation, "The Union may not in this proceeding attempt to renegotiate that provision." *H. Boker & Co., Inc.,* 12 L.A. 608, 612 (1949). Similarly, a federal court should not add to a collective bargaining agreement a term or provision that the parties themselves did not see fit to approve.

Contrary to the position of the Circuit Court (288 F. 2d at 104), this employer and other employers similarly situated might well be detrimentally affected. Employers have sound and justifiable reasons for limiting seniority rights to the existing locations of their plants. Aside from the reasons touched upon above, other adverse results to employers would follow if the Circuit Court's ruling in this case is to become or remain effective.

Many employers in California and elsewhere have multiple-plant operations wherein particular plants are widely scattered throughout the state and nation. Often, each plant has its own bargaining agreement with separate and different seniority provisions. Should such an employer be compelled to permit employees in one plant to retain seniority rights in case of consolidation or merger with facilities of another plant in an-

other location, it would not only lead to labor-management chaos but would virtually foreclose the employer from taking an action that would lead to a sound and efficient operation. Moreover, the federal substantive rule which the Circuit Court adopted would have a further detrimental effect upon employers who relocate their plants in different areas, particularly as a result of the tax advantages and other concessions accorded them by the new community. Usually these concessions are granted to an employer by the new community based upon the premise that meaningful employment opportunities will be made available to local residents. Of course, the ruling of the Circuit Court in this case will negate such a premise and often nullify an advantageous opportunity. And, at times, employers, for reasons of efficiency and economy, transfer their production operations to foreign countries. In such cases, the laws of a foreign nation may effectively prevent American citizens from "following their work." Certainly, in these circumstances, few employers would bind themselves by such burdensome seniority right provisions.

Since the possibility of a geographic relocation was reasonably foreseeable, the court below in effect ignored the intent of the parties in reconstructing the Agreement. No evidence was shown indicating that the parties intended to transfer seniority rights in these circumstances. In this regard the opinion of the arbitration board in *Jones & Laughlin Steel Corp.*, 20 L.A. 797, 799 (1953) is pertinent. Addressing itself to the extension of seniority rights from one plant to another, and from one company to another, the board stated:

> "We find absolutely no basis for such an interpretation of the Agreement. When it is considered that seniority has no existence apart from contract, and that in the ordinary course of events seniority extends only for the duration of employment with a particular employer, it is clear that any interpretation which constitutes a departure from this norm should be based only upon the clearest evidence that such departure was actually intended by the parties. We find no such evidence in the record before us."

Moreover, the District Court, the trier of fact, found that if there was any intent regarding seniority rights, other than that expressed in the Agreement, it was that the parties did not intend to extend seniority rights beyond the location of the existing plant. Even assuming there exists ambiguity in the Collective Bargaining Agreement, the District Court in effect resolved that ambiguity based upon the evidence before it. The question of intent is properly one for the trial court to decide and its decision should not ordinarily be overturned.

II.

The Decision of the Court of Appeals Upsets the Stability of the Collective Bargaining Process.

The effect of the decision of the Court of Appeals for the Second Circuit is to create a new federal substantive law in regard to seniority rights. See *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448 (1957). In fashioning a body of federal law to enforce and effectuate collective bargaining agreements throughout the country it is incumbent upon a court or

other official body to recognize the realities of labor relations and the collective bargaining process. As indicated, many employer members of this Association have similar seniority right provisions in their collective bargaining agreements; yet few, if any, would consider that these rights extend beyond the present locations of their plants. To ignore the reasonable expectations of parties to such agreements, who act in good faith and in light of labor management practice and precedents, is to fashion a law which is completely out of harmony with and in derogation of the collective bargaining process.

In fashioning a body of federal law in this area Courts should not ignore the already existing "industrial common law."Justice Peters of the California Supreme Court recently discussed with approval the position of Professor Sam Kagel in regard to industrial common law and the intent of the parties. Justice Peters noted that:[4]

> "Professor Kagel, an authority in the field of arbitration, has pointed out that the collective bargaining agreement 'is a codification of much of the industrial common law, *i.e.*, the practices of the industry or plant. Some Agreements specifically provide whether or not remaining unrecorded practices are to be recognized as additional and a substantive part of the Agreement.
>
> " 'Where the parties have not made such specific provisions then to the extent that the unrecorded

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[4]*Posner v. Grunwald-Marx, Inc.*, 56 Advance California—(June 29, 1961), quoting from a paper given by Professor Kagel to the National Academy of Arbitrators on January 27, 1961, at Santa Monica, California.

> industrial common law does not negate or is not inconsistent with the written Agreement it becomes a substantive part of the Agreement for the purpose of interpreting that writing. Thus industrial common law, *i.e.*, practices, are used in the grievance procedure to aid in resolving ambiguities in the written Agreement. But not to add new or contradictory terms to the Agreement.' Thus, the federal rule, at least limited as suggested above, is in conformity with the California cases and results in enforcing the intent of the parties."

In this instance both the intent and the past practice of this Employer and virtually all other employers similarly situated, are contrary to the interpretation given to the Agreement by the Second Circuit. While this Court has not passed upon the question as to the transferability of seniority rights in the wake of a relocation of an employer's plant, it has repeatedly indicated that in moulding a federal common law in this area, the realities of the labor field and past practices should be given special attention. See, *e.g., Ford Motor Co. v. Huffman,* 345 U. S. 330 (1953).

III.

The Court of Appeals' Decision Fails to Recognize the Conflict That Necessarily Results Between the Rule Adopted by It and the Policy of the National Labor-Management Relations Act as Amended.

In any event the Court of Appeals has acted beyond its jurisdiction. The National Labor-Management Relations Act of 1947, as amended, reflects the policy of Congress that employees in an appropriate unit shall

have the right of self-organization and the right to bargain collectively through their chosen representatives and to participate in the determination of wages, hours and working conditions of their employment. Labor-Management Relations Act, 1947, as amended by Public Law 86-257, 1959. The Act accords the National Labor Relations Board the primary and exclusive jurisdiction to determine whether a collective bargaining unit is an appropriate one. It is for the Board to determine whether the particular provisions of a collective bargaining agreement, such as seniority clauses, will discriminate in favor of one group of employees and against another. In this case the contractual guarantee claimed by the plaintiffs would discriminate against employees in the new location, would vitiate the statutory rights of those new employees and could well result in an unfair labor practice.

The question as to the efficacy and scope of seniority rights directly affects the rights of the new employees in the new location and can only be ruled upon and decided by the National Labor Relations Board. The federal and state courts are pre-empted from determining this issue which is within the exclusive jurisdiction of the National Labor Relations Board. See *San Diego Building Trades Council v. Garman,* 359 U. S. 236 (1959). If the decision of the Court of Appeals is forced upon the Employer and the new employees alike, it is in direct contradiction with and in derogation of the national policy as expressed in the Act.

Conclusion.

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated July 21, 1961.

Respectfully submitted,

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